IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 18, 2007 Session

STATE OF TENNESSEE v. GARY SHANE HOWELL

Direct Appeal from the Circuit Court for White County
No. CR2378A Lillie Ann Sells, Judge

No. M2007-00987-CCA-R3-CD - Filed march 18, 2008

Defendant, Gary Shane Howell, was charged in a five-count indictment with the following offenses: (1) possession with intent to sell or deliver more than 0.5 grams of methamphetamine, a schedule II controlled substance; (2) possession with intent to sell or deliver diazepam, a schedule IV controlled substance; (3) possession of drug paraphernalia; (4) misdemeanor evading arrest; and (5) unlawful felonious possession of a handgun after being convicted of a felony drug offense. Defendant subsequently filed a "Motion to Dismiss and/or Suppress Evidence." Following an evidentiary hearing, the trial court announced from the bench, "the Motion to Dismiss in this case is granted." An order was later entered in which the trial court stated, "the defendant's Motion to Suppress the evidence herein is granted." The State appealed the trial court's order pursuant to Tennessee Rule of Appellate Procedure 3(c). After a thorough review of the record and arguments of the parties, we affirm in part and reverse in part.

Tenn. R. App. P. 3 Appeal as of Right;
Judgment of the Circuit Court Affirmed in Part, Reversed in Part

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES and JERRY L. SMITH, JJ., joined.

Robert E. Cooper, Attorney General and Reporter; Preston Shipp, Assistant Attorney General; William E. Gibson, District Attorney General; Doug Crawford, Assistant District Attorney General; and Beth Willis, Assistant District Attorney General, for the Appellant, the State of Tennessee.

Will F. Roberson, Cookeville, Tennessee, for the Appellee, Gary Shane Howell.

OPINION

I. Background

Defendant filed the instant "Motion to Dismiss and/or Motion to Suppress Evidence" ("suppression motion") after a warrantless search of his locked body shop/garage and his vehicle

parked therein on July 22, 2005. This warrantless search resulted in the seizure of incriminating evidence. Defendant's suppression motion did not state the particular items of evidence sought to be suppressed and did not specify which counts of the indictment (if not all counts) should be dismissed as a result of the unconstitutional search. Likewise, the trial court's oral ruling does not clarify whether all five counts of the indictment were dismissed. Further, the written order subsequently entered does not specify what evidence was to be suppressed nor to which counts of the indictment the suppression of the evidence applied. Compounding uncertainty in the record is the following colloquy between the trial court and defense counsel when the suppression motion was called on the docket for hearing:

COURT:	[Defense Counsel], you filed a motion to suppress?
DEFENSE COUNSEL:	Yes, Your Honor.
COURT:	What is your client charged with?
DEFENSE COUNSEL:	The only one that the Motion to Suppress is relevant for, I believe, is the methamphetamine case.
COURT:	Okay, that would be [Indictment Number] 2378. . . .

One interpretation of the above is that the suppression motion only applied to Count I of indictment number 2378. However, Defendant's suppression motion, his trial brief in support of the motion, the pleadings filed by the State, and the trial court's order all are styled as applying to indictment number 2378 in its entirety. In addition, the State filed a motion for reconsideration which was denied by the trial court. This document also references the entire indictment. Finally, the state's notice of appeal, pursuant to Tennessee Rule of Appellate Procedure 3(c) stated nothing to indicate that fewer counts than the entire indictment were dismissed by the trial court's order.

It is well settled law in Tennessee that when there is a conflict between the transcript and court records, the transcript controls. *State v. Zyla*, 628 S.W.2d 39 (Tenn. Crim. App.1981); *Helton v. State*, 195 Tenn. 36, 255 S.W.2d 694 (1953).

When the trial court announced its ruling from the bench that "[t]he Motion to Dismiss in this case is granted," the prosecutor said nothing to indicate her belief that fewer than all five counts of indictment number 2378 were dismissed. Indeed, the prosecutor's only remarks concerned the setting for trial of a separate case with a different indictment number and that the "motion [to suppress] had nothing to do with that particular case."

Based on all of the above it appears the trial court dismissed all five charges pending against Defendant in indictment number 2378. Based upon the facts and our analysis of the law as it applies to those facts, we affirm the trial court's order insofar as it dismisses Count I, possession with intent to sell or to deliver more than 0.5 grams of methamphetamine and Count III, possession of drug

paraphernalia. We note that while items found outside Defendant's body shop/garage could arguably be considered "drug paraphernalia," the only testimony in this rather unclear record pertaining to "paraphernalia" referenced non-specified items found inside the body shop/garage. We will not speculate, based on this record, that any items found elsewhere than inside the body shop/garage, were used to support the charge in Count III.

As to Count II, possession with intent to sell or deliver diazepam, there was no testimony that the diazepam was seized during the warrantless search. The TBI lab report admitted into evidence during testimony about the amount of methamphetamine seized, reveals that thirty seven tablets of diazepam were submitted with the methamphetamine and were analyzed at the same time. It is difficult for us to assume that the diazepam was unconstitutionally seized along with the methamphetamine because the TBI lab report lists Defendant and Lynnel S. Seever as "subjects" of the drugs seized. The elicited testimony at the suppression hearing fails to show if the diazepam was seized inside Defendant's vehicle, from elsewhere in his body shop/garage, or from another location including Ms. Seever's person or possessions. We note they were jointly charged in indictment number 2378 with felonious possession of diazepam. Accordingly, it was error to dismiss Count II of the indictment based upon the record before us on appeal. Regarding Count IV, charging misdemeanor evading arrest, the evidence shows that the warrantless search and seizure had nothing to do with the charge of evading arrest, other than the search occurred after the alleged evading arrest had begun. Accordingly, it was error to dismiss Count IV. Finally, the proof showed two *rifles* were seized during the warrantless search. Count V charges Defendant, pursuant to Tennessee Code Annotated section 39-17-1307(b)(1)(B), with unlawful possession of a *handgun* after he had been convicted of a felony drug offense. According to the proof, there is absolutely no evidence that a handgun was seized during the warrantless search. Therefore, the trial court erred by dismissing Count V of the indictment.

II. Facts

On March 13, 2004, Defendant was placed in the Community Corrections program in Overton County following his conviction in the Criminal Court of Overton County for possession of methamphetamine, a schedule II controlled substance, with intent to sell. Defendant resided in White County at the time and ultimately, on August 5, 2004, Community Corrections Officer Carolyn Young took over supervision of Defendant.

On January 24, 2005, Ms. Young summoned Defendant to the White County Justice Center for a drug screen. A "prosthetic device," intended to falsify the drug screen, was confiscated from Defendant. When a valid test was performed, Defendant tested positive for methamphetamine and marijuana. Defendant then admitted to using the prosthetic device the previous month as well as that day. Ms. Young told Defendant that she wanted law enforcement officers to search Defendant's home. Regarding the January 2005 search, Ms. Young testified at the suppression hearing that "because [Defendant] was on probation, we had the right to do that, and [Defendant] did agree at that time to the search. And the officers took him to his home that afternoon and searched it." No drugs, drug paraphernalia, or other contraband was found during this search.

Ms. Young confirmed in her testimony that neither the Community Corrections Order signed by the trial court, nor the Community Corrections Behavioral Contract signed by Defendant contained any provision whereby Defendant consented to any warrantless searches during the time period he was to be under Community Corrections supervision. Ms. Young also acknowledged that Defendant's consent to the search on January 24, 2005 did not extend beyond that date's search.

Ms. Young filed a Community Corrections violation report against Defendant on February 12, 2005 based upon his positive drug screen and attempt to falsify the drug screen results. On March 17, 2005, Ms. Young filed an amendment to Defendant's violation report because Defendant had absconded.

On July 22, 2005, approximately six months after the January 24, 2005 incident, Deputy Charles Sims of the White County Sheriff's Department went to Defendant's mother's residence to arrest Defendant based on the Community Corrections violation warrant, as amended. Deputy Sims drove his patrol car up the driveway towards Defendant's body shop/garage where Defendant worked on vehicles. Corporal Bulakowski of the Sheriff's Department stayed with his patrol vehicle near a vehicle away from the residence which was believed to be presently used by Defendant. Deputy Sims saw Defendant drive by on an All-Terrain Vehicle ("ATV"). Defendant and a passenger came around the side of the body shop/garage and continued through the field to the woods. Deputy Sims could not pursue Defendant into the woods because he was in a car. However, Corporal Bulakowski was in a four wheel drive vehicle and was able to pursue Defendant into the woods. Deputy Sims returned to the body shop/garage.

Ms. Lynell Seevers came out of the body shop/garage, saw Deputy Sims, and immediately went back inside the building. Deputy Sims began "hollering" and asking Ms. Seevers to come back outside. After approximately fifteen minutes, she emerged from the body shop/garage and locked the door behind her. By this time, another deputy, Deputy Bumbalough, had arrived. Deputy Sims and Deputy Bumbalough looked around the outside of the body shop/garage area and discovered a "burn pile" behind the body shop/garage. Both deputies testified that it contained burned items that were consistent with the manufacture of methamphetamine. The pile contained plastic tubing, acetone cans, propane bottles, and "heat" bottles, partially burned. At this point the law enforcement officers had an arrest warrant for Defendant, but he had fled and not yet been caught. Defendant's body shop/garage was locked and could not be entered absent some forced entry. The deputies felt they had probable cause to search the body shop/garage, but they did not have a search warrant or verbal consent to search. Deputy Bumbalough and Deputy Sims testified that they discussed their options as to searching the shop. Deputy Bumbalough made some phone calls in order to determine if Defendant had consented to warrantless searches as a condition of his Community Corrections supervision. Deputy Bumbalough testified that he called a probation officer in order to determine who Defendant's probation officer was and that he then called several people in an attempt to get in touch with Defendant's probation officer, although he never spoke to her. He did speak with a General Sessions judge who told him that he would make some phone calls to see "what he could come up with." The judge also told him that "we probably had enough [for a search warrant], but

if we could do a probation search, it would actually be better." The deputy was not put under oath for this conversation.

Deputy Bumbalough entered the body shop/garage by opening a closed, but unlocked window. He then unlocked the door for Deputy Sims to enter the building. According to Deputy Bumbalough, they entered the building under the authority of doing a search due to the terms of [Defendant's] probation. The subsequent search of the interior of the body shop/garage and Defendant's vehicle that was parked inside yielded approximately 48.7 grams of methamphetamine contained in three baggies inside the vehicle and "several other items found throughout the building also," which, according to Deputy Bumbalough, included "a couple of rifles and some drug paraphernalia." Defendant's mother arrived at the scene while the deputies were present and apparently Ms. Seevers stayed at the scene at least until the search was completed. Deputies Sims and Bumbalough acknowledged that they had no search warrant or verbal consent from any person at the scene to search the body shop/garage or the vehicle inside it.

Defendant was not seen except as he drove by on the ATV and he did not return to the premises prior to the completion of the search. The sole authority the deputies asserted as justification of the warrantless search of Defendant's body shop/garage, the vehicle, and other contents therein was their belief that as a condition of his Community Corrections sentence Defendant had consented to warrantless searches.

III. Analysis

The two issues raised by the State in its appeal are set forth as follows:

> I. Whether the search of the Defendant's garage was constitutional, despite the absence of consent to search language from the community corrections behavioral contract and order
>
> II. Whether the law enforcement officers were entitled to search the Defendant's garage pursuant to their good faith reliance upon representation by a judicial officer that said no search warrant was necessary

A. Consent to Search Due to Defendant being Sentenced to Community Corrections

The State concedes there was no consent to search provision in Defendant's Community Corrections order signed by the trial court or in the Community Corrections Behavioral Contract signed by Defendant and his initial Community Corrections officer, which would give law enforcement officers the consent necessary to allow the warrantless search of Defendant's body shop/garage and the vehicles located therein. The crux of the State's argument is that the court must look at the facts of the search and seizure and "determine whether the search was reasonable given the totality of the circumstances," including, as in the case *sub judice*, the absence of consent to search language in Defendant's Community Corrections order and the behavior contract. In essence,

the State argues that any person who is released from incarceration after conviction is subject to a warrantless search absent consent or any of the remaining recognized exceptions to the warrant requirement if, based on the totality of the circumstances, law enforcement officers have only reasonable suspicion that the person is involved in illegal activities.

In both cases relied on by the State there were consent to search provisions present in the probationer's order. In *United States v. Knights*, 534 U.S. 112, 122 S. Ct. 587, 151 L.Ed.2d (2001), the Supreme Court held, "the warrantless search of Knights, supported by reasonable suspicion and authorized by a condition of probation, was reasonable within the meaning of the Fourth Amendment." *Knights*, 534 U.S. at 122, 122 S. Ct. at 593. In *Knights*, the defendant had been sentenced by a California court to probation following a conviction for a drug offense. The order of probation mandated that the defendant would "[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest, or reasonable cause by any probation officer or law enforcement officer. *Id*. at 114, 122 S. Ct. at 589. While on probation for the state case, the defendant became a suspect in a federal case involving arson of a power company's property. He was ultimately indicted by a federal grand jury for conspiracy to commit arson, for being a felon in possession of ammunition, and for possession of an unregistered destructive device. *Id*. at 114-116, 122 S. Ct. at 589-90. The charges were the result of evidence seized during a warrantless search of the defendant's apartment. A sheriff's department detective who conducted the search was aware of the "search condition" in the defendant's probation order because he had seen it in the defendant's file at the sheriff's department. The detective felt that a search warrant was not necessary due to the "search condition." *Id*. at 115, 122 S. Ct. at 589.

The defendant filed a motion to suppress the evidence seized during the warrantless search of his apartment. The federal district court held that the detective had reasonable suspicion, based on his investigation prior to the search, that the defendant was involved with incendiary materials. However, the district court granted the motion because the search was for investigatory rather than a probationary purpose. The Ninth Circuit Court of Appeals affirmed. The United States Supreme Court reversed and phrased the issue as follows: "In this case, we decide whether a search *pursuant to this probation condition*, and supported by reasonable suspicion, satisfied the Fourth Amendment." *Id*. at 114, 122 S. Ct. at 589 (emphasis added).

In its opinion, the Court also noted that the Supreme Court of California had held that searches done pursuant to the "probation condition" were constitutional whether done for monitoring the person on probation or for some other investigatory law enforcement purpose. *Id*. at 116, 122 S. Ct. at 590 (citing *People v. Woods*, 981 P.2d 1019, 1027 (1999)). The *Knights* Court further clarified that it had granted certiorari in the *Knights* case "to assess the constitutionality of searches *made pursuant to this common California probation condition*. *Id* (emphasis added).

The government in *Knights* argued that the search condition in the defendant's probation order met the requirements of the Fourth Amendment under the consent exception to the warrant

requirement pursuant to *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L.Ed.2d 854 (1973). *Id*. at 118, 122 S. Ct. 591. However, the Supreme Court noted:

> We need not decide whether Knights' acceptance of the search condition constituted consent in the *Schneckloth* sense of a complete waiver of his Fourth Amendment rights, however, because we conclude that the search of Knights was reasonable under our general Fourth Amendment approach of "examining the totality of the circumstances," *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S. Ct. 417, 136 L.Ed.2d 347 (1996), *with the probation search condition being a salient circumstance.*

Id. (emphasis added).

Arguing that a "salient" circumstance does not mean a "required," "mandatory," or "conditioned upon" circumstance, the State asserts that the absence of any "consent to search language" in Defendant's Community Corrections order or contract "is not fatal to the search." According to the State, reasonable suspicion (less than probable cause) of criminal activity, together with Defendant's status as a probationer, authorized the warrantless search in this case. We are unable to agree with the State upon our reading of *Knights*. The Supreme Court in *Knights* concluded that it could resolve the case before it without determining whether the search condition of Mr. Knight's probation order constituted a consent to search that was a complete waiver of his Fourth Amendment rights. *Knights*, 534 U.S. at 119, 122 S. Ct. at 591. Because the search condition was plainly expressed and Mr. Knight was obviously informed of it, the Supreme Court concluded that "[t]he probation condition thus significantly diminished Knight's expectation of privacy." *Id*. at 119-20, 122 S. Ct. at 592. Based upon this and the fact that the search was supported by reasonable suspicion (this was conceded by Mr. Knight) the Supreme Court held:

> When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable.
>
> * * *
>
> We therefore hold that the warrantless search of Knights, supported by reasonable suspicion and authorized by a condition of probation, was reasonable within the meaning of the Fourth Amendment.

Id. at 121-22, 122 S. Ct. at 593.

The State agrees that in the case *sub judice* there is "an absence of consent to search language [in] the [C]ommunity [C]orrections order." The State asserts that the totality of the circumstances, even including the absence of a search condition in the court order, authorized the warrantless search of Defendant's property by law enforcement officers. The Community Corrections order does

contain language that Defendant "shall . . . allow the *Case Officer* to *visit* [Defendant's] home, employment site, or elsewhere." (emphasis added). However, this language authorizing a "visit" by the "Case Officer" (not law enforcement officers) fails to establish a *Knights* type of "significantly diminished . . . reasonable expectation of privacy" by Defendant due to his probationary status. *Id*. at 120, 122 S. Ct. at 592. The State's reliance on *State v. Davis*, 191 S.W.3d 118 (Tenn. Crim. App. 2006) is also misplaced. The State argues that "[a]s in *Knights*, there is nothing in *Davis* to indicate that a consent to search condition of probation is a prerequisite to a warrantless search of a probation being constitutionally valid." While this statement is literally true, there is also nothing in the *holding* of *Davis* to indicate that a consent to search condition is *not* a prerequisite for a constitutionally sound warrantless search of a probationer in circumstances like those in the case *sub judice* (warrantless searches which are absent of any facts establishing one of the clearly recognized exceptions to the warrant requirement).

The Court in *Davis* acknowledged that the Supreme Court in *Knights* declined to decide whether warrantless searches of probationers are *per se* unreasonable under the Fourth Amendment and whether the acceptance of a search condition by a probationer amounted to consent to completely waive Fourth Amendment rights, but instead addressed the case as being a reasonable search based upon "the Court's 'general Fourth Amendment 'totality of the circumstances' approach . . . with the search condition being a salient circumstance.'" *Davis*, 191 S.W.3d at 121 (quoting *Knights*, 534 U.S. at 118, 122 S. Ct. at 591).

In other words, the Court in *Davis* recognized that the search at issue in *Knights* could have been addressed along three grounds:

> (1) Is it *per se* unreasonable under the Fourth Amendment to conduct a warrantless search of probationers?
>
> (2) Does a probationer's acceptance of a "search condition" requirement of probation constitute consent to search such that the probationer waives his Fourth Amendment rights while on probation?
>
> (3) Under the particular facts of the case, is a warrantless search otherwise constitutionally reasonable under the "totality of the circumstances" approach recognizing that the search condition is a "salient circumstance?"

As noted above, the *Knights* Court took the third approach. In *Davis*, the defendant was on probation for a felony drug offense. A specific condition of his probation provided, "I [defendant/probationer] agree to a search, without a warrant, of my person, vehicle, property, or place of residence by any Probation/Parole officer or law enforcement officer, at any time." *Davis*, 191 S.W.3d at 119. Shortly after the defendant was placed on probation, law enforcement officers received information about defendant's drug related activities. Based on this information they began a surveillance of the defendant's residence which led to reasonable suspicion of illegal drug activity by the defendant. His probation officer and two law enforcement officers went to the defendant's

home and requested permission to search. The defendant declined to grant permission even after being told that refusal to grant permission was a violation of his probation. *Id*. A violation warrant was filed and following a revocation hearing, the defendant's probation was revoked and the original sentence of four years' incarceration was imposed. On appeal, the defendant asserted that the "search condition" of his probation order violated his Fourth Amendment rights and Article I, Section 7 of the Tennessee Constitution because it allowed law enforcement officers to avoid a search warrant and probable cause requirements in order to justify searches. This Court held,

> As in *Knights* we find it unnecessary to address the broader issue of the constitutionality of the warrantless search condition of probation. Nonetheless, we conclude that a search of the Appellant's residence in this case was permitted because: (1) the warrantless search provision was reasonably related as a condition of the Appellant's probation; and (2) the attempted warrantless search of the Appellant's residence was supported by reasonable suspicion. Accordingly, we conclude that the Appellant's refusal to submit to a search under these circumstances constituted a violation of the condition of probation.

Id. at 121-22.

Contrary to the State's assertions, *Knights* and *Davis* do not stand for the proposition that a "consent search" condition in a probation order is not a necessary prerequisite for a warrantless search of a probationer's property based upon reasonable suspicion of criminal activity. The Supreme Court in *Knights* recognized that the search condition in Mr. Knights' case resulted in a significantly diminished expectation of privacy by Mr. Knight. In *Davis*, the search condition was a reasonably related condition of defendant's probation and the attempted search was supported by reasonable suspicion justifying revocation of the defendant's probation. In *Davis*, a warrantless search was not the issue. Indeed, there was no search.

In the instant case, Defendant was on Community Corrections probation for a felony methamphetamine offense. A violation warrant had been issued which alleged that he had attempted to falsify a drug screen and had tested positive for methamphetamine and marijuana. Officers went to Defendant's mother's residence where Defendant had a body shop/garage. The officers observed Defendant drive by them on an ATV and continue on in order to avoid arrest. The officers also observed a woman leave the body shop/garage, see them, and go back inside. Despite the officers "hollering" for her to come out, she failed to emerge for approximately fifteen minutes and when she did emerge she locked the body shop/garage behind her. When the officers looked around the outside of the body shop/garage they noticed a "burn pile" filled with items consistent with the manufacture of methamphetamine. While the totality of these circumstances may have justified the issuance of a search warrant for the building and its contents had the application been properly made to a magistrate, the absence of a significantly diminished expectation of privacy by Defendant regarding a search of his property distinguishes this case from the situation in *Knights* and *Davis*, to the extent *Davis* may apply at all. Accordingly, the State is not entitled to relief as to this issue.

B. Application of the "Good Faith Exception" to the Warrantless Search

The State first raised the argument that the search of Defendant's body shop/garage and vehicle should be upheld because of the "good faith exception" as enunciated in *United States v. Leon*, 468 U.S. 897 (1984) in its Motion to Reconsider filed with the trial court following that court's ruling on Defendant's Motion to Dismiss and/or Suppress Evidence. On appeal, the State concedes that the instant case is distinguishable from *Leon*. The ruling in *Leon* was based upon a search warrant, issued by a neutral and detached magistrate, that was objectively and reasonably relied upon by law enforcement officers even though the affidavit on which the warrant was based did not establish probable cause. The State urges this Court to extend the *Leon* "good faith exception" to warrantless searches when a magistrate advises law enforcement officers to search without a warrant based upon unsworn statements of the officers.

First, the issue was not presented to the trial court in a timely fashion to even enable the trial court to make a finding of fact as to the existence of "good faith." Accordingly, we are not willing, in this case, even if inclined to do so, to extend the ruling in *Leon* to warrantless searches. Second, this Court has held, "adopting a good faith exception under the Tennessee Constitution would unduly reduce the protections contemplated for our citizens by the Tennessee Constitution, the legislature, and the Tennessee Supreme Court." *State v. Husky*, 177 S.W.3d 868, 890 (Tenn. Crim. App. 2005). Therefore, the state is not entitled to relief as to this issue.

CONCLUSION

The search of Defendant's body shop/garage and all the contents therein, including his vehicle, violated the protections of the Fourth Amendment. All items seized during the course of the search must be suppressed as evidence against Defendant pursuant to the exclusionary rule. *See State v. Bartram*, 925 S.W.2d 227, 230 n.2 (Tenn. 1996). The only evidence mentioned in the record as being seized pursuant to the search was methamphetamine, two rifles, and drug paraphernalia. Accordingly, the trial court's order dismissing Count I (methamphetamine) and Count III (drug paraphernalia) is affirmed. The trial court's order insofar as it dismissed Counts II (diazepam), IV (evading arrest), and V (possession of a handgun) is reversed, the charges in Counts II, IV, and V are reinstated and remanded to the trial court for proceedings consistent with this opinion.

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THOMAS T. WOODALL, JUDGE